



February 28, 2001

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2001-0746

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act, (the "act") chapter 552 of the Government Code. Your request was assigned ID# 144493.

The Texas Department of Insurance (the "department") received a request for all applications approved for certification as an Independent Review Organization ("IRO"). You inform us that there are three companies approved as an IRO, and that this office ruled on one of the IROs, the Texas Medical Foundation, in a prior ruling, OR98-0366. Therefore, you have not submitted information related to the Texas Medical Foundation, and inform us that this information will be released in accordance with the prior letter ruling. You claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code. With regard to the remaining requested information, you have notified the other two IROs, Independent Review, Inc ("IRI"), and Envoy Medical Systems, L.L.C. ("Envoy"), of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in act in certain circumstances). We have considered the exceptions claimed by all parties and reviewed the submitted information.

Initially, you argue that social security numbers contained in the requested information are confidential pursuant to section 552.101 of the Government Code. Section 552.101 excepts

from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 (1994)*. The provision of law to which the department cites for authority to withhold social security numbers is section 2(d)(4) of article 21.58C of the Insurance Code. This provision provides that

[t]o be certified as an independent review organization under this article, an organization must submit to the commissioner an application in the form required by the commissioner. The application must include . . . the name and biographical sketch of each director, officer and executive of the applicant and any entity listed under Subdivision (3) of this subsection and a description of any relationship the named individual has with (A) a health benefit plan; (B) a health maintenance organization; (C) an insurer; (D) a utilization review agent; (E) a nonprofit health corporation; (F) a payor; (G) a health care provider; or (H) a group representing any of the entities described by Paragraphs (A) through (G) of this subdivision

Ins. Code Art. 21.58C, §2(d)(4). We cannot conclude that this statute provides specific authority for acquiring the social security numbers of those required to submit a biographical affidavit. We therefore have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and thus excepted from disclosure under section 552.101. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

We next address the arguments of IRI and Envoy for withholding portions of the requested information. Both IRI and Envoy raise sections 552.101, 552.102, 552.104 and 552.110 to protect their information. Initially, IRI asserts that its written screening criteria and review procedures, as well as its method of selecting and credentialing personnel, are confidential pursuant to section 4(i) of article 21.58A of the Insurance Code. Envoy argues that "any information with regard to reviewers" is generally protected under articles 21.58A and 21.58C of the Insurance Code. Section 4(i) of article 21.58A provides:

Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care

providers. Utilization review decisions shall be made in accordance with currently accepted medical or health care practices, taking into account special circumstances of each case that may require deviation from the norm stated in the screening criteria. Screening criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis. Screening criteria must be used to determine only whether to approve the requested treatment. Denials must be referred to an appropriate physician, dentist, or other health care provider to determine medical necessity. *Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.*

Ins. Code art. 21.58A § 4(i) (emphasis added). Upon review of the information IRI seeks to withhold under section 4(i) of article 21.58A of the Insurance Code, we conclude that only Exhibit One, Summary of Screening Criteria, B-1, page 1, with exhibits, is confidential pursuant to this statute, and must be withheld by the department under section 552.101 of the Government Code. The remaining information sought to be withheld by IRI under the Insurance Code may not be withheld under this provision. We also find that a portion of the submitted information pertaining to Envoy marked as “Exhibit 1. Independent Review Plan” is protected under section 4(i) of article 21.58A of the Insurance Code, and must be withheld under section 552.101. We have marked the information pertaining to Envoy to be withheld. None of the remaining exhibits pertaining to Envoy may be withheld under this provision.¹ Nor does article 21.58C of the Insurance Code, pertaining to “Standards for Independent Review Organizations,” provide for the confidentiality of the submitted information relating to Envoy.

IRI and Envoy also argue that certain information is excepted from disclosure based on a right of privacy under sections 552.101 and 552.102. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial*

¹We note that the submitted information of Envoy at roman numeral VII of Exhibit B relates to “Mechanics of Envoy Review Process.” Because this information was not provided to this office, we cannot make a determination as to the confidentiality of this information under section 4(i) of article 21.58A of the Insurance Code. We would caution the department, however, that the improper release of confidential information constitutes a misdemeanor. See Gov’t Code § 552.352.

Foundation, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” However, section 552.102 only applies to employees of a governmental body. Accordingly, we will consider the privacy argument under section 552.101. Upon review of the information IRI and Envoy seek to withhold under common law privacy, we conclude that none of this information is protected by section 552.101. *See* Open Records Decision No. 620 (1993) (background financial information submitted by an individual, not a corporation, protected by right of privacy; corporations do not have right to privacy). We also note in this regard IRI’s assertion that it provides assurances to its physicians that they will remain anonymous except for oversight by the department. We note, however, that agreements to make information confidential cannot repeal or overrule the Public Information Act. *See* Attorney General Opinion No. JM-672 (1987).

IRI and Envoy also raise section 552.104 of the Government Code to protect certain information. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* Therefore, none of the requested information may be withheld under section 552.104.

Finally, both IRI and Envoy assert that their information is protected under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the Restatement’s list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company];

has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). As neither IRI nor Envoy have set forth the factors necessary to establish trade secret protection, we conclude that the submitted information may not be withheld under section 552.110(a).

The governmental body, or interested third party, raising section 552.110(b), must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). As IRI has made only conclusory arguments that release of its proprietary information would result in substantial competitive harm, and as Envoy has made no arguments at all under section 552.110, we conclude that the requested information relating to IRI and Envoy may not be withheld under section 552.110(b).

We note that Envoy also raises sections 552.117 and 552.128 of the Government Code to protect its information from disclosure. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body, peace officers, or employees of the Texas Department of Criminal Justice. As none of the submitted information of Envoy relates to these categories of employees, we conclude that section 552.117 is inapplicable to the requested information.

Section 552.128 of the Government Code provides in pertinent part that:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

As we have no information that the requested information pertaining to Envoy was submitted to the department in connection with an application for certification as a historically underutilized or disadvantaged business, we conclude that this information may not be withheld under section 552.128.

To summarize, the department must withhold the requested information pertaining to IRI, labeled Exhibit One, Summary of Screening Criteria, B-1, page 1, with exhibits, under section 552.101 of the Government Code. The portion we have marked of the submitted information pertaining to Envoy entitled "Exhibit 1. Independent Review Plan" must also be withheld under section 552.101. The department may withhold the social security numbers contained in the responsive biographical affidavits under section 552.101 only if the numbers were obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The remainder of the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

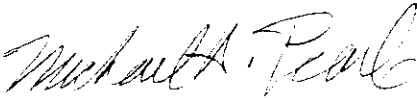
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 144493

Encl. Submitted documents

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